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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 264.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, *Petitioner,*

vs.

ODELL MILLS, as Administrator of the Estate of IRA S. MILLS, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

G. R. HARSH,
Attorney for Respondent,
HARSH & HARSH *on Brief.*

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BRIEF FOR RESPONDENT

STATEMENT AS TO THE CASE

Most of the physical facts are fairly stated in the brief for petitioner, but the "statement of the case" therein, and the whole brief ignores the *soul* of this case, which makes the fundamental occurrences in this tragedy so different from the ordinary employee suit it being generally held that the leaving of the premises of the employer breaks the relation between the employer and employe.

Something of this "*soul*" may be realized from a consideration of the following:

Petitioner's employees had gone on a strike and were threatening violence to others who had taken their places and were carrying on petitioner's interstate com-

merce in their stead. If this violence succeeded even in frightening away these new employees, interstate commerce must stop. Violence can be committed even more readily after the workman has left his fellows and is on his way home than it could while upon the premises of employer engaged actively with other employees in employer's work.

The effects of such violence upon interstate commerce inflicted upon a homegoing employee would be just as effective, (not only in preventing that particular employee from continuing his work, but in preventing employer from securing others to take his place) as if that same violence had been inflicted while the employee was upon the premises of employer.

Cases hold that if the employee injured is upon a vehicle used by the employer, in transporting the employee to and from work, although the vehicle is far from the premises of the employer at the time of the injury, yet, the employee is held to be engaged in the work of the employer and if that work be interstate commerce, then, to be engaged in interstate commerce.

It is not the vehicle that is material, nor the ownership of the vehicle, but the fact of the continuing relationship of the employer and employee.

If the fact that it be found convenient by an employer to transport its employees in its own conveyances away from the premises of the employer to the homes of the employees, continues that relationship, then, how much stronger would be the inference that the relationship of employer and employee was still continuing in the present case? Here the employer found that the lives of its employees were being threatened on their way home and that its interstate commerce work was likely

to stop by reason of these threats, unless the employer extended protection to the employees, not only upon the premises of the employer, but conducted them under such protection, to the homes of the several employees, and the employer, realizing such danger of stoppage of its work, did so extend its protection by physically guarding the bodies of its employees all the way to their homes.

This Court, in an opinion by Justice Van DeVanter, in the case of Mondou vs. N. Y., N. H. & H. R. Co., 56 Law Ed. 345, has stated the philosophy of the Federal Employer's Liability Act as follows, viz:

> "The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce. If the agents or instruments are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are not of the right kind or quality, commerce in consequence becomes slow or costly, unsafe or otherwise ineffecient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous those particular conditions may and often will prevent or interrupt the act of commerce, or make it less expeditious, less reliable, less economical and less secure. Therefore Congress may legislate about the agents and instruments of interstate commerce, and about the conditions under which those agents and instruments performed the work of interstate commerce, whenever such legislation bears, or, in the exercise of a fair legislative discretion can be deemed to bear, upon the reliability or promptness, or economy, or security or utility of the interstate commerce act."

LIBERALITY OF CONGRESS

If Congress could have included the matter in question within purview of the Act, it did so.

Horton vs. Washington, Oregon R. & Nav. Co. 47 LRA (NS) 10

Colasurdo vs. Central R. R. Co., 180 Fed. 83.

PETITIONER'S CONTENTIONS

On page 6 of its brief filed in this court upon the presentation of its petition (which we presume is the only brief to be presented) petitioner sets out its contentions as follows: viz:

1. That Mills was not, at the time of the shooting, employed in interstate commerce;

2. That petitioner rested under no duty to provide Mills with a heavier guard than it did;

3. That it is wholly a matter of speculation and conjecture whether the shooting would have been averted even if a heavier guard had been furnished;

4. That irrespective of any question of negligent failure of the petitioner in that particular, the immediate proximate cause of the death of Mills was the intervening wrongful act of the strikers, for which petitioner was in no way responsible.

We shall take up these contentions separately and we assume that this Court will not consider any other, if indeed any other question could possibly be raised in the case.

BRIEF

I.

It was a jury question, under the evidence, in the trial court, as to whether or not intestate and petitioner were, at the time of the shooting of intestate, engaged in interstate commerce.

St. L-S. F. Ry. Co. vs. Mills, 3 Fed. 2nd Series 882.

Erie R. R. Co., vs. Winfield 61 Law Ed. 1065. (Leaving premises for home but still on premises.)

Chicago & N. W. R. Co., vs. Gray, 59 Law Ed. 1018.

Cudahy Packing Co., vs. Parramore 68 Law Ed. 369-370. (Going to rest house between work on premises.)

North Carolina R. Co., vs. Zachery 58 Law Ed. 596. (Fireman having left interstate engine and going to his boarding house.)

K. C. So. R. Co., vs. Martin 263 Fed. 241.

Ewing vs. Chicago, M. & St. P., 167 N. W. 597.

Lusk vs. Bandy, 184 Pac. 144.

Eley vs. Chicago & G. W. R. R. Co., 166 N. W. 739.

L. & N. R. R. Co., vs. Mullins 181 Ky. 148; 203 S. W. 1058.

L. & N. R. R. Co., vs. Walker, 162 Ky. 209; 172 S. W. 517.

Davis vs. Chicago, R. I. & P. R. Co., 134 Minn., 49; 158 N. W. 911.

Ewing vs. Chicago, M. & St. P. R. Co., 167 Wes. 597; 166 N. W. 739.

Schantz vs. N. P. R. Co., 173 N. W. 556.

Hinson vs. Atlanta & C. A. L. Rwy. Co., 90 S. E. 772.

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Van Burkirk vs. Erie R. Co., 279 Fed. 622.

Atlantic Coast Line R. Co., vs. Williams, 284 Fed. 262.

Columbia & P. G. R. Co., vs. Ganter 222 Fed. 608.

Law vs. Ill. Central 208 Fed. 872.

San Pedro, etc., R. Co., vs. Davide 210 Fed. 872.

Thompson vs. C. & P. S. R. Co., 205 Fed. 20[illegible].

Lamphere vs. Oregon R. & N. Co., 196 Fed. 336.

Baltimore & O. R. Co., vs. Darr 204 Fed. 755.

Wilson vs. Bruner L. Co., 32 So. 460.

1 Roberts Federal Liability of Carriers, Secs. 456 and 457.

The undisputed evidence shows that *petitioner* was engaged in interstate commerce. The undisputed evidence further shows that intestate was employed indiscriminately in interstate and intra-state commerce in the inspection of trains coming into and going out of Birmingham, Alabama, and that his last act before starting home with his guard and his fellow workmen, outside of putting away his tools, etc., on the night of his being shot, was to inspect an interstate train about to leave for Mississippi; that the conditions under which this labor was performed were so dangerous by reason of a strike of former employees of petitioner and their

threats of violence, that, in order to protect its interstate commerce petitioner thought it necessary to use armed guards to protect from physical violence its then employees engaged in this work, not merely while actually at work, but to protect them as instrumentalities in its commerce, when going to and returning from such work to their homes in the City of Birmingham, and petitioner undertook to do so and had been attempting ever since intestate took the place of some striker and subjected himself to the great risk of personal violence, to help petitioner forward its interstate commerce.

If intestate had been deterred from his work or had been hurt or killed while going to or from his home it is a reasonable and almost certain inference that such commerce would have seriously suffered, not only by the cessation of intestate's services therein, but by the consequent frightening of others and thus preventing them from taking the places of the scared off, injured or deceased interstate commerce forwarders.

It thus became as much an essential part of interstate commerce to protect those induced to offer their services to help petitioner out in its extremity in carrying on its commerce, while these helpers in that commerce were on the street or street cars being conducted to their homes through the threatened danger as it was to protect them while actually engaged in striking interstate car wheels to judge of their soundness.

Petitioner seems much concerned about what would happen should this court fail to limit relationships in interstate commerce to the premises of employer. Our answer is that this court has already extended the limit far beyond this to trips to and from home on vehicles conducted by employer.

Petitioner recognized and applied the principle involved by treating as non essential the ownership or management of the vehicle and being in the charge of employee while being conducted by it through the great danger to him as its instrumentality, a sufficient embodiment of the principle involved, but now that death has occurred and a pecuniary claim is made against it, petitioner has changed it mind.

The question as to when the last connection of an interstate commerce employee with interstate commerce has ended for the day, is not so much a question of geography or clock dial reading as it is of the *effect* of the acts and omissions of the employee and employer at the time of the injury upon interstate commerce.

In Lamphere vs. Oregon R. & Nav. Co. 196 Fed. 340 (opinion by Gilbert, Circuit Judge) that Court said:

> "The test question in determining whether a personal injury to an employee of a railroad company is within the purview of the act is, what is its effect upon interstate commerce? Does it have the effect to hinder, delay, or interfere with such commerce?"

We have above quoted to the same general effect from the case of Mondou vs. N. Y. N. H. and H. R. Co. 56 Law Ed. 345.

It makes no difference that the shooting occurred after intestate had ceased for the day or night to swing his lamp or tools under an interstate train. Several of the cases cited in this brief are to this effect.

This court, in the case of Erie R. C. vs. Winfield, 61 Law. Ed. 1065 said, in answering the question, whether the facts in that case sustained the conclusion that the

deceased was employed in interstate commerce at the time of the injury, as follows, viz:

> "The second question must be given an affirmative answer. In leaving the carrier's yard at the close of his day's work the deceased was but discharging a duty of his employment." (quoting the Zachery case.)
>
> "Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work, and partook of the character of that work as a whole, for it was no more of an incident of one part than of another. His day's work was in both interstate and intrastate commerce, and so, when he was leaving the yard at the time of the injury, his employment was in both. That he was employed in interstate commerce is therefore plain, and that his employment was extended to interstate commerce is, for the present purposes, of no importance."

In the Zachery case, 59 Law Ed. 596, this court says:

> "Again, it is said that because deceased had left his engine and was going to his boarding house, he was engaged upon a personal errand, and not upon the carrier's business. Assuming (what is not clear) that the evidence fairly tended to indicate the boarding house as his destination, it nevertheless also appears that deceased was shortly to depart upon his run, having just prepared his engine for the purpose, and that he had not gone beyond the limits of the railroad yard when he was struck. There is nothing to indicate that this brief visit to the boarding house was at all out of the ordinary or was inconsistent with his duty to his em-

> ployer. It seems to us clear, that the man was still on duty and employed in commerce, notwithstanding his temporary absence from the locomotive engine."

These two cases and many others with equal clearness, demonstrate that to be engaged in interstate commerce the servant may have finished his day's task and be on his way home. It is true that in both of these cases the employee was upon the premises of the employer, but, as we think is demonstrated in the cases above cited, while this fact is usually necessary to continue the relation of employer and employee, it is not the test of the continuance of that relationship, and only usually concludes that relationship because ordinarily the *danger begotten by and connected with the employment* and the undertaking of the employer in reference to the employee ends at the line of the premises of the employer, and therefore the duty of employer toward employee ends, at the geographical line of employer's premises.

However, to demonstrate that this was not the principle involved, but only the usual state of facts to which the principle is applied, we cite the cases where employer assumes to conduct employees to and from their places of work in employer's own vehicles and the holding that thus conducting employees to and from their homes the relationship of employee and employer continues in the same character which it had during the active work of the employee in or about his employer's business.

In San Pedro etc., R. Co., vs. Davide 210 Fed. 872, the circuit court for the ninth circuit said: "It is the well established rule that railroad employees while being carried as a part of their daily service to and from their

place of work are fellow servants." The conclusion is arrived at that if engaged in interstate commerce during the day is so engaged when so being carried homeward.

Petitioner in the case at bar had as much or more immediate and complete charge and control of these employees during the time that petitioner was conducting them by an armed guard to their homes *through the threatened danger* arising out of the employment as when other employers were carrying their employees beyond their own premises upon vehicles belonging to the employers, so far as the threatened danger to petitioner's interstate commerce through injury or death to deceased was concerned. That is the best test.

It might be entirely possible that if a breakdown had occurred in the street car and injury thus caused to the employee, that no negligence could be imputed to the employer, as to that injury. However, no such question is in this case. The personal violence to deceased on his trip home was the result of what the employer and employee knew beforehand was necessary to be guarded against by the employer sending an armed guard in charge of the employee, not merely to the lines of employer's premises, but to *the home of employee and* thus to comparative safety.

In the case of Cudahy Packing Co. vs. Paramore, 68 Law. Ed. 369, this Court, in speaking of the continuance of the relationship of employer and employee (compensation case) said:

> "Whether a given accident is so related or incident to the business must depend upon its own particular circumstances. No exact formula can be laid down which will automatically solve every case. The fact that the accident

> happens on a public road or at a railroad crossing and that the danger is one to which the general public is likewise exposed, is not conclusive against the existence of such causal relationship, if the danger be one to which the employee, by reason of, and in connection with his employment, is subjected peculiarly or to an abnormal degree.
>
> "Upon this question of causal relationship, the English decisions are instructive."

Here the opinion quotes a number of cases, then comments upon facts of the case being decided. The accident in that case occurred at the crossing of a railroad over and on grade with a public street, while the plaintiff was going to his work in an automobile, over which his employer had no control and neither did the employer have any connection with the railroad except that the railroad had spurs into employer's plant, and that the employee, in going to his work, had to cross the railroad upon the public highway where he was injured by a collision with the automobile in which he was riding.

The opinion of this court proceeds as follows:

> "We attach no importance to the fact that the accident happened a few minutes before the time Paramore was to begin work, and was, therefore, to that extent, outside the specified hours of employment. The employment contemplated his entry upon and departure from the premises, as much as it contemplated his working there, and must include a reasonable interval of time for that purpose. * * * * In view of the facts and circumstances peculiar to this case, it was fairly open to the State Supreme Court to conclude that the necessary causal relation between the employment and

the accident sufficiently appeared to save it from the constitutional objection."

REPLY TO ARGUMENT IN PETITIONER'S BRIEF

POINT 1:

Petitioner calls attention to a declaration of LaBatt (Vol. 4 page 4674 to the effect that "the doctrine of the cases holding as set out are referable to the conception that the master retains the right to control the servant, although ordinarily dormant during the period of transportation, is susceptible of being at any moment called to active operation."

At the beginning of Section 1555 page 4669, LaBatt lays down the general doctrine that "a servant who, at the time of the accident in suit, was being transported on a railway car or other vehicle furnished for the purpose of facilitating the performance of his work, is deemed to have been injured in the course of his employment." LaBatt in the same section further says:

> "But most of the illustrations of the doctrine are furnished by the decisions relating to railway servants, who, being engaged in the construction or repair of the permanent way and its appurtenances, or in other duties along the line, were injured while traveling on a train operated by other servants of the defendant. * * * and where it occurred while they were being transported from the place where they resided to the place where they worked."

The subject under discussion was whether or not they were fellow servants with those operating the trains or other conveyances and therefore could not recover.

LaBatt further says, in the same section:

> "The character of the train on which the servant was being transported is immaterial, provided it was being used as a means of conveyance to take him, in the course of the performance of his contract to or from the place where his duties called him."

None of these cases had any reference to the Federal Act and in our judgment none of them are, nor is the "rationale" set out by LaBatt in conflict with the position of the Court of Appeals affirming Judge Grubb, the trial judge in the case at bar.

When peitioner's armed guard went to the home of intestate each morning to escort him through the danger created solely by his employment, and to deliver him to the place where his interstate work car inspections were to be actually performed and when the guard came to the plant of petitioner in the middle of the night to inverse the process and to deliver intestate from the dangers which all parties knew beset him along his path homeward, intestate was, on both these occasions, as much or more within the control of petitioner as if he had been upon petitioner's vehicle. In other words, the character or ownership of the vehicle makes no difference. Petitioner "was taking him in the performance of his contract to or from the place where his duties called him."

Ill. C. R. R. Co. vs. Behrens, 58 Law Ed. 1051.

Petitioner cites and quotes from the Behrens case to the effect "that he was expected, upon the completion of that task, to engage in another, which would have been

a part of interstate commerce, is immaterial under the statute, for by its terms and true test is the nature of the work being done at the time of the injury."

This enunciation of the principle applicable to the case this Court had in hand is not at all inconsistent with the case at bar.

As shown above, this Court holds that interstate character must be at least in part impressed upon the act being done by the employee at the time of his injury, and, if so, it does not then matter whether there is also an impression of intra-state character upon the act, nor is any account taken of the proportion of the two. So that, if the act being done at the time is wholly of *intra-state character*, the servant *is not* engaged in *interstate* commerce.

However, this court has just as strongly and as consistently held that the act being done at the time of the injury *need not* be any act of *actual work* so that it is *sufficiently related*, and, in pursuance of this principle holds that where the day's work is impressed with interstate character, then the leaving of the work at noon for refreshment or rest or when the day's work is done, for the purpose of going home, is still impressed with the character of the day's work, at least so long as the employee is upon the premises of the employer, or upon its vehicle being transported by it from the work to the home.

If LaBatt's "rationale" or if the Behren's case either is inconsistent with this doctrine, then it is in conflict with later cases decided by this court. We see no conflict.

Erie R. Co. vs. Welch, 61 Law Ed. 319.

The yard conductor in this case, having been engaged in *intra*-state commerce exclusively, started to the yard office, but had not, up to the time of his injury, been informed of any orders changing the character of his work.

This enunciation cannot be in conflict with the later cases decided by this Court to the effect that after work is ended and the employee is on his way home upon a vehicle of the employer that his then status is impressed with the character of his day's work, whether that be intra-state or interstate. We think the two entirely consistent.

We must not forget the principle laid down by this Court running through all of its decisions where at all called for, viz: that it makes no difference whether the act being done by the employee is work, or returning from or going to work, but whatever it is, to recover under the act in question it must be impressed with interstate character actually *or by relation*.

Minn. Etc. R. Co. vs. Winters, 61 Law. Ed. 358.

The plaintiff in the above styled cause was a machinist's helper, repairing an engine in the round house which had already completed its interstate work and was "at home."

Justice Holmes said, (page 359):

> "The last time before the injury on which the engine was used was on October 18, when it pulled a freight train into Marshalltown, and it was used again on October 21, after the accident, to pull a train out of the same place. That

> is all we have, and is not sufficient to bring the case under the Act. This is not like the matter for repairs upon a road permanently devoted to commerce among the states. An engine as such, is not permanently devoted to any kind of traffic and it does not appear that this engine was destined especially to do anything more definite than such purpose as it might be needed for."

Intestate, in the case at bar, having impressed interstate commerce character upon his day's work, and upon the last act of his day's work, had not been delivered in safety to his home by petitioner's guard, when shot. Interstate character still was upon his act in that petitioner was attempting to deliver its interstate employee to a place of safety through the dangers which petitioner's contract with him had created and until delivered he was still an instrument of interstate commerce.

Sou. Ry. vs. Puckett, 61 Law Ed. 1321.

The petitioner catches at the expression of Justice Pitney quoted by petitioner, but which means nothing more, in our judgment, than any of the other many expressions of this and other courts holding that the actual thing being done at the time must have interstate character whether by direct work therein, or by relation thereto. In fact, the case was decided within three weeks of the Winfield case, 61 Law Ed. 1065, in which this Court said:

> "In leaving the carrier's yard at the close of his day's work the deceased was but discharging a duty of his employment." (citing authorities) . "Like his trip through the yard

> to his engine in the morning, it was a necessary incident of his day's work, and partook of the character of that work as a whole, for it was no more an incident of one part than of another. His day's work was in both interstate and intra-state commerce, and so, when he was leaving the yard, at the time of the injury, his employment was in both. That he was employed in interstate commerce is therefore plain, and that his employment was extended to intra-state commerce, is, for present purposes, of no importance."
>
> Sou. Ry. vs. Pitchford, 253 Fed. 736.

In that case plaintiff had entered upon the work of receiving ice from the ice chute and transporting it to an ice box. The circuit court said:

> "This work was too remote from interstate commerce to be regarded a part of it."
>
> "Pritchard, Circuit Judge, dissented."

We are not concerned with the correctness velnon of this decision. Because in the case at bar there was no question of the interstate character of deceased's last acts before submitting himself to petitioner's guard for the journey home. The question is not in the case at bar, whether intestate's work was of an interstate character, but whether during his being taken home he still preserved the character of an instrumentality in interstate commerce and this decision throws no light on that subject.

Those decisions which do immensely illuminate the case at bar are the ones holding that servants on the way home, transported by their employers, if engaged during the day in interstate commerce, are still, by relation, to be considered as still so engaged.

Erie R. Co. vs. Winfield, 61 Law. Ed. 1057.

In attempting to differentiate this case from the case at bar, petitioner says:

> "For there, Winfield was still on the employer's premises, and under all the decisions entitled to the protection of the relationship while leaving the yards because the company owed him a duty to enable him to get beyond its premises without being exposed to the negligence of the other employees."

This seems to us to be utterly at variance with the position and argument of petitioner when attempting to apply against the case at bar the claimed doctrine of cases in which plaintiff was said not to be engaged in interstate commerce because he had actually ceased work in interstate commerce, or was not actually engaged therein at the time.

Petitioner, we presume, now admits that under all the authorities a workman leaving the premises under the circumstances named though *not actually engaged in any work*, has his relationship impressed with the character which it had acquired by reason of work that he had done while on the premises.

Whether admitted or not, we believe this to be the doctrine established by this court, and, if so, it seems to us to conclusively follow that it is applicable to the facts of the case at bar, *because the danger through which intestate was being conducted when he was shot directly sprang from his employment, and was realized and undertaken to be guarded against by petitioner until intestate should be delivered to his home.*

Fletcher vs. B. & O. R. Co. 42 Law. Ed. 411.

In that case petitioner shows in its brief, by quoting from the opinion of the Court, that plaintiff had finished his employment for the day and left the premises of his employer and was moving along the public highway in the city, with the same rights any other citizen would have. Certainly, under those circumstances, the relationship was broken.

There is nothing new in Roberts. The question is, *when the work has* been completed *so that it may be said that there is no longer any relationship to work in interstate commerce*. The Robert's quotation does not touch this question.

Hull vs. Phila. R.R. Co. 64 Law. Ed. 670.

The only question decided in that case was that Hull, the deceased, "remained for all purposes,—certainly for the purposes of the Act—an employee of the Western Maryland Co. only." This company was not the defendant.

He was therefore not an employee at all of the petitioner in that case. Had he been, he would undoubtedly have been an interstate employee.

The remaining cases argued are state cases, except the Shanks case, which we will notice later.

The case of Gray vs. Chic. & N. W. RR Co. 153 Wis. 637, was taken to this Court, and this Court's action reported in 59 Law. Ed. 1018, where the action of the state court was not interfered with *solely upon the ground* that the state statute under which it was brought was as favorable to the railroad company as the Federal Act and therefore there was nothing of which the railroad company could complain. This Court seems to

us to intimate that the conclusion of the state court might otherwise have been held to be wrong though the point was not decided.

Shanks vs. Del. L. & W. Co. 60 Law. Ed. 436.

In this case plaintiff was employed in defendant's machine shop and engaged in repairing parts of locomotives used both in interstate and intra-state transportation and was *at the time of his injury* engaged in taking down and putting into a new location in such shop a countershaft.

This was merely putting in condition local machinery, without regard to its future use and has always been held by this Court not to constitute interstate commerce employment.

We do not think there is even an expression in the whole opinion which militates at all against the position taken by the Circuit Court of Appeals in the case at bar.

II.

Petitioner had uniformly furnished the guard in its attempt to conduct and protect its employees to and from their homes.

The present argument does not relate to the question of interstate commerce specially, as that has already been argued both by petitioner and respondent. It does relate to the question of duty as it affects negligence vel non.

Petitioner found itself in the midst of a nationwide strike and unable to carry on its business without procuring strike breakers. Not only does the evidence specifically show various threats by the strikers against

these strike breakers, but as petitioner states in its brief, it was common knowledge that there was widespread violence and bloodshed all over the country growing out of this strike.

It is possible that had petitioner merely offered to pay its strike breaking employees their wages, without more, that no duty would have been begotten to extend protection. However, under the facts shown in the case at bar petitioner did not stop there, but, at least impliedly, promised deceased protection against the violence of strikers and in pursuance of that promise undertook to conduct them under armed guard to their homes.

Such an implied promise and undertaking begets the duty to at least use reasonable care, skill and diligence in furnishing such protection, and what is such reasonable care, skill and diligence is generally a matter for the jury; that is, for the common sense, common experience and common judgment of mankind in the jury box. It is not a matter for expert testimony. Had it been it would still be for the jury, advised by such testimony.

In the case at bar, as petitioner's attention had been called to specific threats and to the inefficiency of the guard that had been furnished, it would be ignoring an allowable, if not practically necessary, inference, that petitioner should have furnished a more effiecient guard, had the court taken that question from the jury.

Petitioner says in its brief that the testimony does not show that any promise was made. True, there is no express promise set out in the evidence but the circumstances set out certainly furnish the basis for an inference of such promise, which might be drawn by the jury.

The record shows that when intestate entered petitioner's service and from that time on up to his death, petitioner had been furnishing such guard, and the common knowledge referred to by petitioner shows that an efficient guard was necessary. The warnings also show the necessity for efficient guarding and it is hardly likely that intestate would not have implied from these circumstances a promise by petitioner that he would be guarded, and no less likely that petitioner understood intestate would imply such promise.

Petitioner implies in its brief that a praetorian guard for each employee would have been necessary. The number of strikers were comparatively small in each yard, as only a very limited class of employees were on strike. Petitioner says (page 25 brief) that "yet it is a matter of common knowledge that in this particular strike, as in many others, the utmost care, consistent with any reasonable outlay for protection, failed in numberless instances to avert violence and bloodshed."

If this were true, yet that would not excuse the failure to furnish but one guard for two employees and that one guard reported to petitioner to have shown the white feather and to have refused to accompany employees where their duty called them because of the presence there of strikers.

In no case is it possible to see with certainty what would be the result in future of any given action or inaction but under the circumstances as known to petitioner beforehand, it would seem to the average man that the least that could have been done by petitioner for the men who were risking their lives in its service would have been to attempt to adequately guard them.

James C. Davis, Director Gen. vs. Green, 67 Law, Ed. 300 and: Roebuck vs. A. T. Etc. R. Co. 99 Kansas 544.

These cases merely decide that under the United States law a master is not liable for a wanton and willful act of an employee done to satisfy his own spite and not in furtherance of his master's business. Both suits were based on this kind of wrong of an employee.

In the case at bar the suit is based on the negligence of omission by reason of which deceased was killed while related to interstate commerce, and petitioner is not sought to be held liable, (respondeat superior) for any willful act of any servant or of anybody else.

The wilfulness of a third person was the known danger into which petitioner negligently led intestate to his death by not furnishing adequate protection when the duty arose so to do.

In the Roebuck case the chief justice and Justice West dissented.

COMPENSATION CASES

Petitioner cites four compensation cases which it claims hold that injury by the violence of a striker was not received in the course of the employment of the injured employee and that therefore he was not entitled to compensation.

It is to be observed that these are state cases and that it is entirely possible that neither the state legislatures in enacting the laws nor the state courts in interpreting them, had the same liberal intent toward employees as did Congress and this Court.

Then too, we find in the cases themselves, either stated or hinted at, the distinction on which the Court of

Appeals acted in the case at bar and which is commented on in many cases.

For instance, in Redner vs. H. C. Faber & Sons (N. Y.) quoted from on page 27 of Petitioner's brief, it is said:

> "Also compensation has been allowed while the employee was traveling to and from his work in a conveyance furnished by the employ under the contract of employment and the necessities of the situation."

This being true, Mills was acting just as much in the *course of his employment*, when under his implied contract of employment and the necessities of the situation, he was being guarded to his home by petitioner after his day's work in interstate commerce.

III AND IV

The two propositions argued by petitioner under the above numbers respectively are but two denials that the death of Mills was the proximate result of the negligence alleged.

Petitioner strongly criticises the opinion of the two learned Circuit Judges who sat in the Circuit Court of Appeals and the "judgment" of the trial court (Hon. W. I. Grubb) and says that what they did was "to transmute a mere inactive condition into an active causative force, responsible for the killing."

It seems to us that the judges understood the situation much better than petitioner now seems to.

There was a storm of threats and hate raging between employer's plant and employee's home. Employee presumably would not agree to go to and fro between his home and employer's plant until employer had

impliedly agreed to conduct him under adequate protection against the storm, and had pretended to do so by furnishing some but inadequate protection. The storm blew the life out of employee, though it blew no worse than a reasonable man would have anticipated.

What was the proximate cause of employee's death, the raging storm, known to employer and the violence of which could have been reasonably anticipated, *or* the conducting of employee out in it without adequate protection? The violence of the strikers was not an *independent intervening cause*. It was the known *condition to be avoided* by adequate protection. It was the *anticipated violence* which begot the duty to exercise care. It did not *intervene*. It *originated* the necessity for care. But for the actual or implied threats of the strikers to commit violence, there would have been no reason for, nor duty to, exercise care.

The duty of employer to exercise care while conducting employee homeward under armed guard to prevent harmful consequences to employee of a *dangerous condition arising solely out of the employment* and known to employer cannot be answered by saying "yes, the very thing happened which it was our duty to try to prevent, and we did not try sufficiently and the thing happened, *but* that thing was the independent act of a lawless human being." The known threatenings of lawless human beings can make conditions of work just as dangerous as defective machinery.

It would be equally illogical to allow negligent employer to escape on the theory that it could not be certain just how much, if any, amount of guarding would have saved the life of employee and to call any judgment exercised by the jury and approved by the trial judge in the premises *mere speculation*.

Anything in the future is uncertain. It is common knowledge that guards tend to ward off violence and men generally including kings, presidents and great men act on this knowledge. Petitioner acted on it. However, though petitioner had direct notice that the one guard it supplied was insufficient and the evidence shows it had others, it answered employee's complaints by saying that the threats were a bluff, and the death followed.

The following are cases in point on the principle, in addition to the cases cited in the opinion of the Court of Appeals.

So. Ry. vs. Bush, 122 Ala. 487.
Bham Ry. & E. Co. vs. Smith, 121 Ala. 352.
L, & N. R. Co. vs. Miller, 65 So. 169.
Danson vs. A. G. S. R. Co., 65 So. 487.
Doyle vs Boston, Etc. Ry. Co., 145 Mass. 485.
Filson vs. Pacific Express Co., 84 Ken. 614; 114 Pac. 863.
Cudahy Packing Co. vs. Paramore, 68 Law. Ed. Bottom page 369 & p. 370.
Munsey vs. Webb, 58 Law Ed. 165-6.
Green vs. Atlantic C. L. R. 38 A. L. R. 1453.

In the Green case on the page above cited, after stating the general rule, said:

> "But, where it appears that the master has actual knowledge of conditions within his control which conduces to expose a servant in the performance of the master's work to danger from the lawless acts of third persons and that

> the intervention of such illegal acts of third persons is a consequence reasonably to be expected from the maintenance of such conditions, a different case is presented."

In the case of Oklahoma & Gulf R Co. of Texas vs. W. J. Pike, 264 S. W. 593, the Court of Civil Appeals of Texas says in part as follows:

> "This is an appeal by appellant Railway company from a judgment of the District Court of Grayson County in favor of appellee in an action for damages for the breach of an express agreement entered into by appellant to protect appellee from assault and injuries by strikers and strike sympathizers. On July 1st, 1922, there occurred a nationwide strike of shop craft employees of railway companies, including those of appellant at Dennison, Texas. Appellee, in this situation, entered the service of appellant on July 12, 1922, and while engaged in performing the duties of his employment was shot by a striker or strike sympathizer, and wounded substantially, as alleged in his petition."

The court could not find anything illegal, or unrecoverable in that cause of action.

> See also Hansen vs. Dodwell, etc. L. R. A. 1918 C. 925.

Petitioner says that more guards would not have done any good. How does it know? The jury had the right to consider human nature and their general common knowledge and common sense. The trial judge did not agree with them nor did any member of the Court of Appeals. The sole dissenter put his action on the ground

that employee was not engaged in interstate commerce when shot.

It is true that the trial judge in this cause held that there was no evidence that the particular guard was himself guilty of any negligence on the occasion of the shooting. But the Court did not say that his being alone was not negligence. Cantrell, the guard furnished was a demonstrated coward and defendant had had this fact reported to it. It seemed that the strikers knew of his cowardice and laughed when the butt end of his gun was exposed while they were in the street car with him. His presence, being a coward, was not preventive defense.

However, that may be, the learned trial judge was of the opinion that it was for the jury to say under all the circumstances whether or not there was negligence which proximately contributed to the death in not sending sufficient guards. The Court did not say that the jury should not have weighed, in determing this question, the fact that Cantrell was an unfit person to be sent as a guard. He was certainly insufficient in and of himself. He needed assistance. Two guards are better protection than one.

The jury in any case may draw any reasonable inference which is justified by the evidence, weighed in the balance of common sense, common knowledge and common experience.

All these scales tell us that men who have violence against others at heart without personal animosity will not endanger their own lives any more than possible and will not, therefore, attack people who are properly protected and guarded.

Whether or not any lack of care would probably have prevented injury is hardly demonstratable in any case. It must practically always be left to inference.

There is no doubt in the evidence that the strikers shot Mills to death, possibly intending to get Weathers, the older man in what they considered crime against their jobs. Weathers was the man they had threatened on two or three occasions.

Defendant's lawyers take advantage of this fact to argue in the Circuit Court of Appeals, that, because Weathers was the man threatened that no action would lie for the killing of Mills, or that the jury would have any right to infer that the death of Mills proximately resulted in his not being sufficiently guarded. The position seems to us so ill founded as to scarcely need attention at all. Mills and Weathers were what is known as "buddies"; that is they were joint inspectors. They went together all the time on their work and they were being taken home together under guard of the company—men employed for that purpose.

Danger to one was danger to the other, and Mills was a strike breaker also.

We do believe, that it would be hard to find a human intellect or a human heart (not interested adversely) which would approve of the attitude of the defendant in this case and its effort to show that the very purpose for which it hired plaintiff's intestate into danger, being to prevent delay and interruption of its interstate commerce, had no real relation to interstate commerce, and that if it did have such relation while the injured person was actually on the premises, employer could legally turn them loose to the tender mercies of the strikers as soon as they got out of the yards where they were com-

paratively safe half-guarded, notwithstanding at the time of the hiring and up to the time of the death the company actively conducted itself on the idea that employees must be conducted under guard to their homes.

Our claim is that the company did in principle exactly what it should have done up to the death, except that it did it inefficiently and negligently.

Respectfully submitted,

HARSH & HARSH
Birmingham, Ala.

G. R. HARSH,
Attorney for Respondent